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No. 82-22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES M. NAMEN, *et al.*,
Petitioners,

v.

CONFEDERATED SALISH and KOOTENAI TRIBES of the FLATHEAD RESERVATION, MONTANA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the relevant historical facts relating to the negotiation and implementation of the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, support the decision of the court below that the bed and banks of the south half of Flathead Lake are held by the United States in trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana.

II. Whether the Confederated Tribes may reasonably regulate the exercise of federal common law riparian rights of non-Indian landowners on tribal trust land forming the bed and banks of the south half of Flathead Lake, through an ordinance that has been expressly approved by the federal government in its exercise of ultimate control over these Tribes and over all navigable waters of the United States.

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BRIEF IN OPPOSITION

ADDITIONAL STATUTES INVOLVED

Act of March 3, 1891, 26 Stat. 1091; Act of March 3, 1909, 35 Stat. 781; Act of March 3, 1911, 36 Stat. 1058; Act of August 24, 1912, 37 Stat. 518; Act of March 7, 1928, 45 Stat. 200; Act of March 4, 1929, 45 Stat. 1623.

STATEMENT OF THE CASE

The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the "Tribes"), initiated this litigation in 1973, when James M. Namen and members of his family, without permission from any authority, dumped an estimated 174,000 cubic feet of rock and dirt into Flathead Lake.[1] The Tribes sued to protect valuable

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[1] The landfill extends 340 feet into the Lake and then runs parallel to the shoreline for approximately 200 feet, for a total of

tribal property rights which have existed now for over 125 years, which have always been recognized to exist,[2]

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540 feet, and is approximately 40 feet wide at the bottom, 10-15 feet deep, and 10 feet wide at the top. *See Confederated Salish and Kootenai Tribes v. Namen*, Mem. Op. (Petitioners' Appendix, at 87, 138, 155) (hereafter referred to as "App. ——"). The estimate was calculated as follows: 540 (length) x 10 (depth) x 30 (derived from 40-foot width at base to 10-foot width at top) = 174,000.

Petitioners imply that conduct such as that of the Namens, over which the Tribes sued, has been comprehensively regulated, citing the State's "Shoreline Protection Act, 75-7-201 *et seq.*, M.C.A. 1981" (Petition, at 4, n.2). The Namens, however, made their landfill in 1973, and the State enacted its act in 1975, two years after the Tribes challenged such activity. Prior to the 1975 act, the State regulated the construction of wharves and docks on "lands under water belonging to the state" and such structures "shall be public wharves and docks." *See* 85-16-101, *et seq.*, M.C.A. 1979 (cited by the district court. App. at 84-85.).

[2] *See, e.g.*, Senate Doc. No. 153, 71st Cong., 2d Sess. (1930):

> Flathead Power Development. The Flathead River power sites, five in number, and all within the Flathead Reservation, are among the most important undeveloped power sites in the United States. This is because of (1) the existence of Flathead Lake, a very large natural reservoir . . . .
>
> The south half of the Lake is in the Indian Reservation . . . . (*Id.* at 2).
>
> * * *
>
> In the case of a power development upon Indian lands, the title to the site also remains vested in the United States Government but in trust for the Indian tribe, and the site is rented for the 50-year period of the license to the licensee . . . . (*Id.* at 6).
>
> In other words, the Indians have the ownership of the five sites and of that portion of the Flathead Lake that lies within the reservation . . . (*id.* at 33).

The Tribes currently receive $2.6 million annually for one of their power sites, licensed to Montana Power Company, pursuant to a 1978 order of the Federal Energy Regulatory Commission. Prior to this latest increase, they received $950,000 a year. (*See* App. at 24, n.26).

and which, when questioned, have been reconfirmed in the Tribes.[3]

The district court held, *inter alia*, and the court of appeals agreed, that all lands within the original boundaries of the Flathead Indian Reservation are still part of the Reservation. *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. 452, 464 (D. Mont. 1974), App. at 178, *aff'd*, 534 F.2d 1376 (9th Cir.), App. at 202-05, *cert. denied*, 429 U.S. 929 (1976) (*"Namen I"*).

In 1975, the City of Polson, Montana, sued the Tribes, seeking a declaratory judgment that the Flathead Reservation had been disestablished, or terminated, by the Flathead Allotment Act, Act of April 23, 1904, ch. 1495, 33 Stat. 302, and that the Tribes no longer had any jurisdiction within the city limits. App. at 236-43. The State of Montana intervened as a plaintiff in that case. In 1977, the United States filed a separate suit, as the Tribes' trustee, against the City of Polson and the State of Montana, asking for a declaratory judgment that the Flathead Reservation had not been disestablished or diminished by the 1904 Act and that the Tribes do have authority to enact and enforce reasonable regulations concerning the use of the bed and banks of the south half of Flathead Lake. Both of those cases were consolidated with the original *Namen* case.

Ultimately, the district court (i) reaffirmed its conclusions in *Namen I* that the United States holds the bed and banks of the south half of Flathead Lake, to the high-water mark, in trust for the Tribes and that the Namens and the City of Polson, through the fee patents issued them or their predecessors, have the customary riparian

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[3] Forty years ago the Court of Appeals for the Ninth Circuit held that the bed and banks of the south half of Flathead Lake were held by the United States for the Tribes, finding that the necessary facts existed to rebut an "equal footing" argument. *Montana Power Co. v. Rochester*, 127 F.2d 189 (1942) (App. at 156 *et seq.*).

rights of access and wharfage, under federal common law, and (ii) held that the Flathead Reservation has neither been diminished nor disestablished. The court accordingly granted the Tribes and the United States summary judgment on the issues of the disestablishment of the Reservation and the ownership of the lakebed. It ruled, however, that the Tribes have no authority to regulate the riparian rights of non-Indians who own land riparian to the south half of Flathead Lake.

The Namens, the State and Polson all appealed to the United States Court of Appeals for the Ninth Circuit on the "disestablishment" and "ownership" issues. The Tribes appealed from the district court's ruling on the "regulatory" issue. On January 23, 1982, the court of appeals ruled: (i) that the Flathead Reservation has not been terminated, disestablished or diminished; (ii) that the United States holds title to the bed and banks of the south half of Flathead Lake, to the high-water mark, in trust for the Tribes; and (iii) that the Tribes have the authority to regulate, in a reasonable manner, the exercise of federal common law riparian rights by non-Indian owners of land littoral to the south half of Flathead Lake.

The Namens and the State now ask this Court to issue a writ of certiorari to review the decisions of the court of appeals on the "ownership" and "regulatory" issues.[4]

STATEMENT OF THE FACTS

1. The Treaty of Hell Gate

By the Treaty of Hell Gate, July 16, 1855,[5] the United States, represented by Governor Isaac Stevens, prevailed

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[4] The City of Polson also seeks review of these issues, but relies on the Namen petition to support its request (Polson Petition, No. 81-2406, at ii). The Tribes therefore respond only to the Namen petition on these issues.

[5] The Treaty was negotiated pursuant to the Act of March 3, 1853, 10 Stat. 226, 238-39, which authorized the President to

upon the predecessors to the Tribes to relinquish their aboriginal territories in exchange for what is now known as the Flathead Reservation.[6]

The minutes of the treaty council make clear that neither the Flathead, Kootenai, Upper Pend Oreille nor Lower Pend Oreille Indians wanted either (i) to relinquish any of their respective territories, (ii) to move from their respective territories, or (iii) to share a reservation with each other. The United States, however, wanted desperately to achieve those results in order to open the Tribes' lands to non-Indian settlement; and, by sophistry, cajolery, ridicule, promises, gifts, and an inexorably superior negotiating position, it was able to achieve its goals.[7] Article II of the Treaty specifically included within the Reservation the south half of Flathead Lake.[8]

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commence immediately negotiations "with Indian tribes west of Missouri and Iowa for the purpose of securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands. . . ."

[6] Governor Stevens' son Hazard was at the Hell Gate Treaty Council. He later wrote a biography of his father. An accompanying map, at pages 14-15 of Vol. II, sketches generally the territory of the Kootenai, Upper Pend Oreille, Lower Pend Oreille and the Flathead, and shows the Flathead Reservation, as provided for by the Treaty. It includes the south half of Flathead Lake. A copy of that map is reprinted as Appendix A to this brief.

[7] *See* Official Proceedings at the Council held by Governor Isaac Stevens, Supt. of Indian Affairs with the Flathead, Pend Oreille and Kootenai Tribes, at Hell Gate—Records of the Bureau of Indian Affairs, Treaty File Letters Received, 1855, Washington, W601 (Enclosure) National Archives and Records Service.

[8] "To a point due west from the point halfway in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course. . . ." 12 Stat. 975, 976. Flathead Lake is approximately 26 miles long and 5 miles across at its widest. Therefore, something in the neighborhood of 65 square miles of lake area was included within the Reservation by the Treaty.

The Senate ratified the Treaty in 1859. *See* 12 Stat. 975.[9] The north boundary of the Reservation was surveyed in 1887 by United States Deputy Surveyor Harrison. Harrison located this boundary by determining "the north-south midpoint of Flathead Lake, and the boundary line was extended from this point to the east and to the west." [10]

2. Congressional Action Relating to the South Half of Flathead Lake

Two years after Montana was admitted to the Union,[11] Congress referred specifically to the Lake in the Act of March 3, 1891, 26 Stat. 1091, whereby Congress granted a railroad right-of-way through the Reservation, on terms agreed to by the Tribes and Secretary of the Interior.

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[9] By the Act of June 5, 1872, 17 Stat. 226, Congress relocated the Flathead Tribes from the Bitterroot Valley to the present day Reservation.

[10] *Confederated Salish and Kootenai Tribes v. United States*, 173 Ct. Cl. 398, 400 (1965).

[11] The Montana Territory was established by the Act of May 26, 1864, 13 Stat. 85. The Act provided, that "nothing in this act . . . shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States . . . respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise. . . ." *Id.* at 86.

Montana was admitted to the Union pursuant to the Act of February 22, 1887, 25 Stat. 676. That Act contained language similar to the Territorial Act, providing that Indian treaty lands would not be part of the State's territory, absent consent of the Indians. 25 Stat. 677.

The Act provided that "when said railroad shall have been constructed to the south end of said Flathead Lake said company may establish a temporary terminal on the shore of said lake . . . and pending completion of said railroad, may utilize the waters of said Flathead Lake for transportation purposes." [12]

In 1896, Congress appointed a Commission to seek a cessation of a portion of the Flathead Reservation.[13] The Commission was unsuccessful, and the United States subsequently abandoned its effort to seek a cessation of the Reservation.[14] Instead, by the Act of April 23, 1904, 33 Stat. 302, it simply opened the Reservation to non-Indian settlement.

The 1904 Act was amended several times.[15] Three of the amendments related specifically to the south half of

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[12] The Tribes suggest that this Act shows that Congress considered the south half of the Lake to be held in trust for the Tribes, pursuant to the Hell Gate Treaty, and that neither bed nor banks went to the State on its admission to the Union. Congress was then well aware of the equal footing doctrine, which was the subject of this Court's opinions in *Martin v. Wadell*, 41 U.S. 367 (1841), and *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). For example, in 1850, prior to the Treaty of Hell Gate, Congress admitted California to the Union "on an equal footing with the original States in all respects." Act of September 9, 1850, 9 Stat. 452.

[13] Act of June 10, 1896, 29 Stat. 321, 341.

[14] Petitioners seek to imply that by Article VI of the Hell Gate Treaty it was understood the Tribes and their lands, including the Lake, would come under State jurisdiction. Petition, at 14, n.19. *See also id.* at 10, n.11. But Article VI merely prescribes the rules that would apply if the President, at his discretion, were to (i) provide for allotments, and (ii) assign allotments to tribal members "willing to avail themselves of the privilege." (12 Stat. 977; App. at 212). *See Confederated Salish and Kootenai Tribes v. United States*, 193 Ct. Cl. 801, 810-11 (1971).

[15] *See, e.g.*, Act of March 3, 1905, 33 Stat. 1048, 1080; Act of May 31, 1906, 34 Stat. 205; Act of June 21, 1906, 34 Stat. 325, 354; Act of May 28, 1908, 35 Stat. 251, 267; Act of May 29, 1908, 35 Stat. 444, 448; Act of March 3, 1909, 35 Stat. 781, 795; Act of

Flathead Lake as constituting part of the Reservation. By the Act of March 3, 1909, 35 Stat. 781, 796, Congress provided:

> That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to reserve from location, entry, sale, or other appropriation [pursuant to the 1904 Act] all lands within said Flathead Indian Reservation chiefly valuable for power sites, or reservoir sites, and he shall report to Congress such reservations.

Pursuant to this Act, the Secretary reserved from disposition, for the benefit of the Tribes, lands which included the power sites on the Flathead River plus the south half of the Lake, which is a natural reservoir for those power sites.[16]

The other two acts are the Act of March 3, 1911, 36 Stat. 1058, 1066, providing that any patent for a tract bordering Flathead Lake shall provide that the conveyance is subject to a flowage easement in conjunction with power development [17] and the Act of August 24, 1912, 37 Stat. 518, 527, which amended the easement provision.[18]

April 12, 1910, 36 Stat. 296; Act of June 25, 1910, 36 Stat. 855, 863; Act of March 3, 1911, 36 Stat. 1058, 1066; Act of August 24, 1912, 37 Stat. 518, 527.

[16] *See* note 2 *supra*; *Confederated Salish and Kootenai Tribes v. United States*, 181 Ct. Cl. 739 (1967). *See also Montana Power Co. v. F.P.C.*, 459 F.2d 863 (D.C. Cir.), *cert. denied*, 408 U.S. 930 (1972); *Montana Power Co. v. F.P.C.*, 445 F.2d 739 (D.C. Cir.), *cert. denied*, 400 U.S. 1013 (1971); *Montana Power Co. v. F.P.C.*, 298 F.2d 335 (D.C. Cir. 1962).

[17] "In the issuance of patents for all tracts of land bordering upon Flathead Lake, Montana, it shall be incorporated in the patent that 'the conveyance is subject to an easement of one hundred linear feet back from the contour of elevation nine feet above the high-water mark of the year nineteen hundred and nine of Flathead Lake, to remain in the Government for purposes connected with the development of water power.' "

[18] "That an easement in, to, and over all lands bordering on or adjacent to Flathead Lake, Montana, which lie below an ele-

The last Act by Congress relating to the Lake was enacted in 1928, when Congress authorized development of the tribal hydroelectric sites. The Act of March 7, 1928, 45 Stat. 200, 212-13, provided:

> That the Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power, of power sites on the Flathead Reservation . . . *provided* . . . that rentals from such licenses for the use of Indian lands shall be paid the Indians of said reservation as a tribe. . . .[19]

Congress has not acted with respect to Flathead Lake since that time. However, the Secretary has approved a license to develop tribal hydroelectric site #1, and that license is held currently by Montana Power Company.[20] In approving the license, the Secretary recognized tribal ownership of the south half of the Lake and the fact that ownership has been a factor in establishing the annual charges paid the Tribes.[21]

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vation of nine feet above the high water mark of said lake for the year nineteen hundred and nine, is hereby reserved for uses and purposes connected with storage for irrigation or development of water power, and all patents issued for any such lands shall recite such reservation."

[19] Congress, by the Act of March 4, 1929, 45 Stat. 1623, 1639-40, directed the Federal Power Commission, in issuing any permits or licenses under the authorization of the Act of March 7, 1928, to "waive payment of the usual administrative fees or commissions charged under existing laws relating to or under regulations of said Federal Power Commission in the issuance of any such permits or licenses."

[20] The license was issued in 1930 for a 50-year term. Montana Power Company, since expiration of the term, has received annual licenses from the Federal Energy Regulatory Commission, pursuant to 16 U.S.C. § 808(a), pending a hearing on competing applications for a new license filed by the Company and the Tribes.

[21] *See* note 2 *supra*. In approving the 1930 license, the Secretary approved a report that noted: "That bearing in mind the special

SUMMARY OF ARGUMENT

This case simply does not warrant the exercise of certiorari jurisdiction.

1. The Ownership Issue

The court of appeals reviewed all of the arguments presented by petitioners, applied the law as most recently articulated by this Court in *Montana v. United States*, 450 U.S. 544, *reh'g denied*, 452 U.S. 911 (1981), to the specific facts of this case, and ruled against petitioners.

Petitioners are unhappy with losing on the ownership issue, and seek yet one more chance to argue their version of the facts before one more court. That, of course, is not a valid basis for review by this Court.

2. The Regulatory Issue

With respect to the regulatory issue, too, the court of appeals applied principles previously articulated by this Court. Again, the mere fact that petitioners do not like the results does not warrant review. That is especially so in light af the fact that regulation of riparian rights on Flathead Lake is under the plenary power of the federal government, through the Corps of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1976), and the discharge of pollutants and dredged or fill material in navigable waters by the Clean Water Act of 1977, which amended the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1376 (1976). In other words, any regulation by the Tribes is exercised at the sufferance of the federal government. *See* App. B to this brief.

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powers vested by law in the Secretary of the Interior in this case, provision should be made for complete amortization of the entire development cost within the 50-year period of the lease. . . . This would enable the project in addition to the annual rental to the Indians to pay itself off during the lease and to be turned over to the Government for the Indians as a going concern, to be at that time retained or released as may seem best." Sen. Doc. No. 153, 71st Cong., 2d Sess. 8-9 (1930).

REASONS FOR DENYING THE WRIT

1. The Ownership Issue

Issues involving reservation Indians and their property must be decided by reference to the applicable treaties, statutes and relevant facts.[22] The courts below did just that in ruling, once again,[23] that the bed and banks of the south half of Flathead Lake are owned, to the high-water mark, by the United States in trust for the Confederated Tribes.

The Treaty Council minutes show that the United States wanted the Flatheads, the Kootenais and the Upper and Lower Pend Oreille Indians on one reservation. None of the Tribes wanted to leave its respective aboriginal homelands or to share a reservation; eventually, however, they had to go. The Reservation established by the Treaty included the south half of Flathead Lake, with a surface area of approximately 65 square miles.[24] In the negotiations that led to the Treaty, concern was expressed for the fact that many of the Indians were not hunters,[25] and therefore inclusion of 65 square miles of the Lake within the Reservation would be of vital concern to them.[26]

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[22] *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

[23] The issue was addressed by the district court on three separate occasions and by the circuit court twice.

[24] Petitioners never address the fact that, at issue here, is ownership of approximately 65 square miles.

[25] Alexander, Chief of the Upper Pend Oreille, was concerned that the Lower Pend Oreille, would not leave the "mission", the area generally of the present-day Reservation, because they "have no horses; they have only canoes." *See* Council Minutes at 50, cited in note 7 *supra*. The Ninth Circuit recognized fishing as an important fact in its holding in *Montana Power Co. v. Rochester*, 127 F.2d 189 (1942).

[26] Petitioners, while recognizing that Flathead Lake is the largest fresh water body west of the Great Lakes, apparently are of the position that as such it is indistinguishable from any given river or stream in the western United States.

Petitioners seek to dismiss as insignificant the fact that fishing was a way of life to one of the Tribes party to the Treaty. They do so for the obvious reason that fishing, even off-Reservation fishing, when a part of a treaty right, always has been held by this Court to survive challenges constructed on the equal footing argument. For example, in *United States v. Winans*, 198 U.S. 371 (1905), the issue was whether Indian treaty rights to fish "at all usual and accustomed places, in common with the citizens of the Territory," survived the admission of Washington to the Union (or whether, by its admission "upon an equal footing with the original states", the State had "the power to grant rights in or dispose of the shore lands upon navigable streams.") *Id.* at 382. This Court answered the question in favor of the Indians, by upholding the treaty provisions:

> The elements of this contention and the answer to it are expressed in *Shively v. Bowlby*, 152 U.S. 1. It is unnecessary, and it would be difficult, to add anything to the reasoning of the case. The power and the rights of the States in and over shore lands were carefully defined, but the power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered throughout the cases which seemed to assert a contrary view.

Id. at 383.

The principle articulated in *Winans* has been cited by the Court in numerous cases upholding treaty fishing rights against challenges based on "equal footing" arguments. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (exclusive fishing rights in navigable waters, submerged lands and adjacent uplands);[27] *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) (off-Res-

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[27] The Court's opinion did not explicitly mention the "equal footing doctrine," but it was argued to the Court. *See* Brief for Alaska Pacific Fisheries, October Term, 1918, No. 212.

ervation fishing, Columbia River); *Tulee v. Washington*, 315 U.S. 681 (1942) (off-Reservation fishing rights); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) (fishing rights in navigable waters extending 3,000 feet from certain islands);[28] *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (treaty hunting and fishing rights survived termination of Menominee Reservation);[29] *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968), *reh'g denied*, 393 U.S. 898 (off-Reservation fishing rights);[30] *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44 (1973) (commercial pursuit of off-Reservation treaty fishing rights); *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, *modified*, 444 U.S. 816 (1979) (off-Reservation fishing rights, marine as well as fresh water).[31]

This Court also has rejected, by implication, the proposition that, because of the equal footing doctrine, (i) off-Reservation statutory hunting rights did not survive statehood by relying on *United States v. Winans*, *supra*, and its progeny, in *Antoine v. Washington*, 420 U.S. 194

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[28] "Federal authority was lodged in the Secretary in 1891 [to regulate the Indian fishing under challenge] and it was not dislodged by the Statehood Act." *Id.* at 59.

[29] The State argued that the equal footing doctrine precluded survival of treaty hunting and fishing rights upon dissolution of the Reservation and termination of trusteeship by the United States. *Id.* at 411, n.12.

[30] *Menominee* and *Puyallup* were decided on the same day.

[31] The Court noted: "All of the treaties were negotiated by Isaac Stevens, the first Governor and first Superintendent of Indian Affairs of the Washington Territory, and a small group of advisers. Contemporaneous documents make it clear that these people recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries. . . ." *Id.* at 666 and nn.8-11. The treaties involved were negotiated in 1854-1855 (*id.* at 661-62), contemporaneously with the 1855 Hell Gate Treaty.

(1975),[32] and (ii) treaty hunting rights in the area of a former Reservation were dissolved by Congress when it terminated federal supervision thereof, *Menominee Tribe v. United States, supra.*

Furthermore, the actions of the Federal Power Commission, in providing for development of a tribal hydroelectric site, and the setting of annual rentals to be paid the Tribes, reflect the congressional position of tribal ownership,[33] and the approval of the initial license and subsequent participation in readjustment of the annual charges paid the Tribes by the Secretary of the Interior, operating under congressional directive, also reflect the congressional position.

Finally, the issue of ownership has been either addressed directly or relied upon in numerous decisions, and the result always has been contrary to the position of petitioners.[34]

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[32] The area involved was once part of an Executive Order Reservation, not a treaty Reservation, established in 1872. Washington became a state in 1889, and it was a year after that before Congress enacted the statutory basis of the hunting rights vindicated by the Court. *Id.* at 197-98.

[33] In hearings on the provisions of the bill that became the Act of March 7, 1928, 45 Stat. 200, 212-13, relating to the development of hydroelectric sites on the Reservation, testimony of the Department of the Interior on the 1914 appropriations bill was made part of the record.

> Senator Townsend. Where is this—on public or Indian domain?
>
> Mr. Newell. On Indian land wholly.
>
> Senator Townsend. And the lands are valuable?
>
> Mr. Newell. We have requested that all lands along the lake be withheld and all lands along the river not allotted. . . .

Hearings before Subcommittee of the Senate Committee on Appropriations, Interior Department Appropriations Bill, Fiscal 1929, 70th Cong., 1st Sess. 53 (1929).

[34] *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942); *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. at 457, n.7; *United States v. Pollmann*, 364 F. Supp. 995, 998-99 (D.

In essence, on the ownership issue, petitioners assert that the court below misread the opinions of this Court and compounded its error by then misapplying its erroneous reading to the wrong facts.[35] Yet, to support this argument, petitioners choose to dwell on treaties other than the Hell Gate Treaty.[36]

Mont. 1973); *Dillon v. Antler Land Co.*, 341 F. Supp. 734, 741 n.16 (D. Mont. 1972), *aff'd*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975); *Seifert v. Udall*, 280 F. Supp. 443, 444 n.1 (D. Mont. 1968); *United States v. 5,677.94 Acres of Land*, 162 F. Supp. 108, 116 n.8 (D. Mont. 1968); *cf. Montana Power Co. v. F.P.C.*, 459 F.2d 863, 865, 872 (D.C. Cir.), *cert. denied*, 408 U.S. 930 (1972); *Montana Power Co. v. F.P.C.*, 445 F.2d 739, 742 n.1 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 1013 (1971); *United States v. Bouchard*, 464 F. Supp. 1316, 1335 (W.D. Wis. 1978).

Petitioners seek to minimize the fact that *Montana Power Co. v. Rochester, supra*, has been followed in other proceedings by stating that since Montana Power Co. was a party to those proceedings, it was estopped to challenge the decision. (Petition at 15, n.21). But in each of those proceedings the staff of the then Federal Power Commission appeared and presented its position independently of Montana Power Co., the Tribes and the Secretary of the Interior. *See, e.g., The Montana Power Co.*, Project No. 5, 38 FPC 766 (October 4, 1967); *The Montana Power Co.*, Project No. 5, 25 FPC 221, 222 (January 30, 1961) ("This proceeding is reopened for the purpose of affording an opportunity to the parties thereto, including Commission staff, to present such additional evidence as they may deem to be material and relative to the issues involved, . . ."

[35] Petition at 7-14.

[36] Petitioners, aware that one of the Tribes party to the Hell Gate Treaty negotiations relied on fishing (*see* note 25 *supra*), suggest this is an irrelevant consideration, because they read the Treaty as excluding the Lake from exclusive treaty fishing rights. (Petition at 12). Petitioners apparently suggest that their position is somehow improved because the Indians had words for "stream", "river" and "lake" (Petition at 12 and nn.15, 16). Petitioners' argument, however, supports the court below, since it was the United States that drafted the Treaty, selected the language, and included an area of approximately 65 square miles of the Lake in the Reservation. Even a casual reading of the Council minutes shows this Treaty was not "negotiated" but rather "imposed" on

Petitioners also seek support for their request for review by referring to facts and events that occurred long after the Treaty was negotiated, but the relevant history to the Treaty supports the court below.[37]

The Namens also assert that, even if the south half of the Lake is held by the United States in trust for the Tribes, they own to the low-water mark, relying on *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).[38] Petitioners assert that this question was not addressed below; it was, by the district court and the court of appeals, and each court ruled to the contrary. As Petitioners concede, there is no need for a uniform national rule;[39] and, indeed, there cannot be one, for each case involving treaty property must be resolved by the circumstances surrounding the treaty negotiations, the specific language of the treaty and the relevant historical facts. Here, all were reviewed by the courts below, as they had been previously in *Montana Power Co. v. Rochester*, *supra*, and the earlier conclusion reaffirmed, that the patent conveyed only to the high-water mark.

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the Tribes, but in the process of imposition the government included as an integral part of the Reservation the south half of the Lake.

[37] The subsequent ownership pattern within the Reservation that developed after the Act of April 23, 1904, 33 Stat. 302, is irrelevant to determining the effect of the 1855 Treaty. The total acreage transferred to non-Indians for villa and town sites pursuant to the Act of April 23, 1904, was 5,374.86. *Confederated Salish and Kootenai Tribes v. United States*, 193 Ct. Cl. 801, 839 (1971). The Reservation encompasses approximately 1,245,000 acres (*id.* at 807) of which 485,171.31 were disposed of pursuant to the 1904 Act (*id.* at 839). The lands were disposed of between 1910 and 1935 (*id.* at 824, n.40).

The ten-foot drawndown referred to by petitioners results from the operation of the hydroelectric facility developed at the tribal site, licensed in 1930 but not operational until 1939. *See* 38 F.P.C. 766, 774 (1967).

[38] Petition at 19.

[39] Petition at 21.

Not only is this issue not one that warrants the attention of this Court; it was correctly decided below, and petitioners suffer no harm.[40]

2. The Regulatory Issue

Petitioners also ask this Court to review the ruling of the court of appeals that the Tribes may reasonably regulate the exercise of federal common law riparian rights by non-Indian landowners along the south half of Flathead Lake. Respondents submit that the court of appeals carefully applied the principles articulated by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), to the facts of this case; that its decision is correct; and that the decision presents no issue worthy of review by this Court.

It is well-settled that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Santa Calra Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

In its most recent decisions on the issue, this Court has reaffirmed and emphasized the fact that Indian tribes do possess some measure of civil regulatory authority over non-Indians.[41] In *Washington v. Confederated Tribes of the Colville Indian Reservation, supra*, this Court upheld

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[40] Under the decision below, the Namens are accorded riparian rights of access and wharfage.

[41] In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court concluded that the inherent authority of tribes does not extend to criminal prosecution of non-Indians within their reservations. This Court found that tribes still retain those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status, and responded that exercising criminal jurisdiction over non-Indians was inconsistent with that status. *Id.* at 208.

the power of a Tribe to tax non-Indian purchases of cigarettes on a Reservation, applying the principle that tribal authority is divested only "in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. . . ." 447 U.S. at 153. And, in *Montana v. United States*, *supra*, the Court, while striking down a Crow tribal ordinance banning all hunting and fishing by non-Indians on fee lands on the Reservation, upheld the right of the Crow Tribe to regulate hunting and fishing on tribal trust lands. Furthermore, the Court stated that tribes may regulate non-Indians even on fee lands when their "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.

The court of appeals correctly applied *Colville* and *Montana* to the Tribes' Shoreline Protection Ordinance, and held that that modest regulatory measure is within the authority of the Tribes. First, applying the *Colville* reasoning, the court noted that there are no significant federal interests impaired by tribal regulation of non-Indian riparian rights. Indeed, the court of appeals pointed out, the United States itself has participated on the Tribes' behalf in this lawsuit, and has argued that, rather than interfering with overriding federal interests, the Tribes' Ordinance actually furthers the United States' anti-pollution interests. *Namen III*, *supra*, 665 F.2d at 963-64.[42]

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[42] The Namens weakly suggest two overriding federal interests —protecting non-Indians' interests under the Bill of Rights, and ensuring that the "justifiable expectation" of the nonmembers "enticed" onto the Reservation by a federal sales pitch are not frustrated. The court of appeals gave these same assertions the short shrift they deserve. The court pointed out in a footnote that the first argument would preclude *any* tribal jurisdiction over non-Indians, a result clearly not mandated by this Court, and the second ignores the far more significant expectations of the Tribes resting on explicit treaty guarantees. *Namen III*, *supra*, 665 F.2d at 963-64, n.30; App. at 31, n.30. Furthermore, it seems absurd that peti-

Second, noting this Court's recognition of the right of the Crow Tribe to regulate non-Indian hunting and fishing on tribal trust lands, and noting that the banks of Flathead Lake are held, to the high-water mark, by the United States in trust for these Tribes, the court of appeals observed that the Tribes here seek only to regulate non-Indian use of their own tribal trust property, by controlling structures extending onto Flathead Lake. It held, therefore, that, under *Montana*, the Tribes' governmental authority encompasses this form of regulation.

Furthermore, even apart from their ownership of the bed and banks of the south half of Flathead Lake, the court of appeals held that the Tribes' inherent sovereignty extends to regulation through the Shoreline Protection Ordinance because the Ordinance seeks to regulate an activity that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, *supra*, 450 U.S. at 566. The court noted that the conduct that the Tribes seek to regulate herein, if unregulated, "could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources." *Namen III*, *supra*, 665 F.2d at 964.[43]

The correctness of the court of appeals' ruling on the Tribes' Shoreline Protection Ordinance is buttressed by this Court's recent decision in *Merrion v. Jicarilla Apache Tribe*, 50 U.S.L.W. 4169 (U.S. January 25, 1982), in which the Court ruled that the Jicarilla Apache Tribe has

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tioners would continue to suggest the presence of overriding federal interests when the federal government itself has taken the opposite view.

[43] The Namens deposited an estimated 174,000 cubic feet of rock and dirt into the Lake. *See* note 1 *supra*, and accompanying text. The Namens also assert there are approximately 1,400 docks and wharves on the south half of the Lake (Petition at 4, n.2). If each riparian owner made a landfill such as the Namens for each dock or wharf, the Lake would receive 24,360,000 cubic feet of rock and dirt.

inherent sovereign authority to impose a severance tax on non-Indians removing oil and natural gas from tribal lands. Citing its decision in *Colville*, the Court again recognized that "the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." 50 U.S.L.W. at 1471. It quoted with approval the language in *Colville* that "Indian tribes have a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." *Id.* The Confederated Tribes' significant interest in non-Indian activities on the south half of Flathead Lake has been amply demonstrated in this case.[44]

Moreover, the Tribes' Shoreline Protection Ordinance has been incorporated by the Corps of Engineers in its regional permit for Flathead Lake (*see* App. B to this brief). It is the federal government, of course, which has ultimate authority over both the Tribes and over the federal riparian rights which the Tribes seek to regulate. Not surprisingly, petitioners choose completely to ignore this point.

In addition, the Confederated Tribes are organized under the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.* ("IRA"). Article VI of their Constitution, approved by the Secretary of the Interior in 1935, empowers the Tribal Council to promulgate and enforce ordinances to promote the peace, safety, morals, and general welfare of the Tribes, provided that "any ordinance directly affecting nonmembers shall be subject to review by the Secretary of the Interior." Article VI, Section 1(n). Ordinance 64A (Revised) was adopted pursuant to these provisions and, as expressly required, was submitted to and approved by the Secretary of the Interior in 1977 (App. at 285). According to its

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[44] *See, e.g.*, note 43 *supra*.

own terms, any amendments to Ordinance No. 64A must also be approved by the Secretary of the Interior.[45]

The Ordinance also comports with the congressional regulatory scheme for navigable waters of the United States. It is well-settled that Congress, through its constitutional power to regulate commerce, has ultimate control of navigable waters within the country. Congress has exercised this power through the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401 *et seq.* (1976), which forbids construction on any navigable water without a United States Army Corps of Engineers permit (33 U.S.C. § 403), and through the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (1976), which governs dredging and discharge of fill material or pollutants into all waters of the United States.

Under these laws, Congress contemplated a cooperative, joint, regulatory scheme, with federal regulation of all United States navigable waters supplemented by "local" regulation of navigable waters within specific jurisdictions. In 33 U.S.C. § 1251(g), Congress proclaimed as its federal policy that "[f]ederal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."[46]

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[45] App. at 284. In *Merrion v. Jicarilla Apache Tribe, supra*, this Court concluded that these constraints on IRA Tribes "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies." 50 U.S.L.W. at 4172.

[46] Furthermore, 33 C.F.R. § 320.4(j) provides in relevant part:

> *Other Federal, state or local requirements.* (1) Processing of an application for a Department of the Army permit normally will proceed concurrently with the processing of other required Federal, State, and/or local authorizations or certification. *Where the required Federal, State and/or local certification and/or authorization has been denied, the application for a Department of the Army permit will be denied without*

The United States, in implementing its policy of joint federal and local control, has incorporated application of the Tribes' Shoreline Protection Ordinance in its regional permit for Flathead Lake. The permit states:

> I. *Special Conditions*
>
> 1. . . . . The work [described in this Regional Permit] is authorized after final approval has been obtained from the state and applicable local government or *when appropriate, the Confederated Salish and Kootenai Tribes of the Flathead Reservation.*
>
> 2. This permit is applicable only to activities which are performed in accordance with rules and regulations of the Montana Lakeshore Protection Act of 1975 if outside the Flathead Indian Reservation, *or the Tribes' Shoreline Protection Ordinance, Ordinance 64A (Revised), when appropriate and if within the boundary of the Flathead Indian Reservation.* (Emphasis added.) [47]

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prejudice to the right of the applicant to reinstate processing of his application if subsequent approval is received from the appropriate Federal, State and/or local agency. . . . (Emphasis added.)

[47] App. B to this brief at 2. Petitioners suggest, as they did before the court of appeals, that the Tribes' Shoreline Protection Ordinance violates the equal protection and due process guarantees of the fifth amendment because it regulates persons who are not eligible to participate in tribal government. Petition at 27-30.

First, petitioners' assertion is simply incorrect. Non-Indians may have direct involvement in administration of the Ordinance's regulatory scheme. Under Section 8, the Shoreline Protection Board, which has broad responsibility for, *inter alia*, issuance and denial of permits or variances, is composed of seven members, no more than four of whom may be enrolled tribal members. And, although initial review of the Board's action may be by the Tribal Council, persons may appeal the Council's decision to an independent tribunal, the Tribal Court. Ordinance 64A (Revised), §§ 9, 10.

Second, even if petitioners' argument were correct, under the decisions of this Court, it fails on both jurisdictional and substan-

The federal government thus has recognized that the Tribes' Shoreline Protection Ordinance is nothing more than a reasonable local law, setting forth appropriate limitations upon the exercise of riparian rights in an effort to protect navigability, the public safety and welfare, and the Lake's environment.

There is absolutely no reason for this Court to devote a substantial portion of its valuable but limited time and resources to review the legality of a tribal Ordinance that has been carefully reviewed and approved by the United States Court of Appeals for the Ninth Circuit and the Department of the Interior and adopted by the Department of the Army—and that is, at all times, subject to the ultimate authority of the federal government over the Tribes and over navigable waters of the United States.

Certiorari to review the regulatory issue should, therefore, be denied.

CONCLUSION

The only real issues petitioners raise turn on the particular facts of this case and this case alone. Indeed, it is inherent in the issues that each was decided on the basis of unique treaties, statutes and historical facts. In essence, the petitioners ask the court to make a third

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tive grounds. First, the Tribes are subject to the equal protection and due process guarantees of the fifth amendment only through the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41 (1976) ("ICRA"), and this Court has held in *Santa Clara Pueblo v. Martinez, supra*, 436 U.S. 49, that federal habeas corpus is the only remedy available in federal court to enforce that statute. *See Namen III, supra*, 665 F.2d at 964. Nothing in the ICRA or *Martinez* indicates, as petitioners argue, that the jurisdictional limitation applies only to tribal "self"-government.

Finally, the argument itself—even if it were properly before this Court—already has been rejected by this Court in *United States v. Mazurie*, 419 U.S. 544, 557. *See Namen III, supra*, 665 F.2d at 964. Furthermore, this Court has upheld tribal civil jurisdiction over non-Indians in *Colville*, *Montana* and *Jicarilla*, and in none of these cases was the non-Indian eligible to participate in tribal government.

review of facts that have consistently been the bases of legislative, executive, administrative and judicial action supporting the position of the courts below.

Perhaps more importantly, resolution of issues presented by the petition is of interest only to the parties before this Court.[48] They have no national significance. No new issues are presented. No new law has been proclaimed—there has been only a careful application by two federal courts of settled principles to a single treaty relating to only one Indian reservation.

Certiorari should be denied.

Respectfully submitted,

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(202) 783-4800
Attorney for the Confederated Salish and Kootenai Tribes and Thomas E. Pablo

Of Counsel:
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EDWARD M. FOGARTY
SUSAN O. BERGHOEF

[48] The case is, of course, extremely important to the respondent Tribes, who currently receive $2.6 million annually for their developed hydroelectric site. *See* notes 2 and 21 *supra*. Petitioners seek to overturn this recognized ownership and accomplish, in part, what Senator Wheeler of Montana predicted when he testified on the provisions of the bill that permitted licensing of tribal hydroelectric sites, the Act of March 7, 1928, 45 Stat. 200, 212-13:

> The Indians are very skeptical that this property is going to be taken away from them. A great many Indians on the Flathead Reservation in a few years are going to be absolute paupers unless they are provided for, and they feel that this water-power site, belonging to them, is something that will bring in a revenue to them during their lives and during the lives of their children, and will keep them from going to the poor house.

Hearings before Subcommittee of Senate Committee on Appropriations, Interior Department Appropriations Bill, Fiscal 1929, 70th Cong., 1st Sess. 21 (1929).

APPENDIX A

THE LIFE OF

ISAAC INGALLS STEVENS

BY HIS SON

HAZARD STEVENS

WITH MAPS AND ILLUSTRATIONS

IN TWO VOLUMES

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APPENDIX B

[SEAL]

DEPARTMENT OF THE ARMY
Seattle District, Corps of Engineers
P.O. Box C-3755
Seattle, Washington 98124

NPSOP-RF 6 August 1982

Reference: 071-OYB-4-007899
Regional Permit
Flathead Lake, Montana

The inclosed Regional Permit 071-OYB-4-007899 authorizes the general public to install various types of structures in Flathead Lake, Montana. This Regional Permit was issued by the Seattle District Engineer on 28 July 1982. The authorized work is to place rock fill for log crib piers, place concrete and backfill for piers, place fill and concrete for boat ramps, place concrete for support (ties) used for boat launching rails, and place concrete for anchors used for mooring buoys, small floats, water withdrawal systems, and boat lift stations. The work is limited to noncommercial use and is subject to the conditions contained in the Regional Permit.

Issuance of this permit is authorized by the Secretary of the Army in accordance with Section 404 of the Clean Water Act.

For additional information, please contact Mr. Russ McCutchen, telephone (206) 764-3495.

Sincerely,

/s/ GERALD A. KELLER
Chief, Regulatory Functions Branch

1 Incl
Regional Permit

[SEAL]

DEPARTMENT OF THE ARMY
Seattle District, Corps of Engineers
P.O. Box C-3755
Seattle, Washington 98124

NPSOP-RF 28 July 1982

DEPARTMENT OF THE ARMY PERMIT

REGIONAL PERMIT
FLATHEAD LAKE, MONTANA
071-OYB-4-007899

Referring to Public Notice No. 071-OYB-4-007899 proposing a Regional Permit to:

Perform work in or affecting waters of the United States upon the recommendation of the Chief of Engineers, pursuant to Section 404 of the Clean Water Act, the general public is hereby given authority by the Secretary of the Army:

to

1. Place rock fill for log crib piers.
2. Place concrete and backfill for piers.
3. Place fill and concrete for boat ramps.
4. Place concrete for support (ties) used for boat launching rails.
5. Place concrete for anchors used for mooring buoys, small floats, water withdrawal systems, and boat lift stations.

limited to noncommercial use

in Flathead and Lake Counties, Montana

subject to the following conditions:

I. *Special Conditions:*

1. For all work described in this Regional Permit, separate state and local approvals and/or permits are required as well. This permit only satisfies Federal law and does not satisfy state and local requirements including leasing of the submerged lands, zoning, building, hydraulic, encroachment, or other required permits. The work is authorized after final approval has been obtained from the state and applicable local government or when appropriate, the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

2. This permit is applicable only to activities which are performed in accordance with rules and regulations of the Montana Lakeshore Protection Act of 1975 if outside the Flathead Indian Reservation, or the Tribes' Shoreline Protection Ordinance, Ordinance 64A (Revised), when appropriate and if within the boundary of the Flathead Indian Reservation.

3. All other fill activities in the Flathead Lake not covered by this Regional Permit require authorization by separate Department of the Army permits or authorization.

4. This permit shall become effective on the date of the District Engineer's signature. The expiration date of this Regional Permit shall be 5 years from the effective date of the permit.

5. This permit may be revoked by issuance of a public notice at any time the District Engineer determines that the singular or cumulative effects of the activities authorized herein have an adverse effect on the public interest. Following such revocation, any future activities in areas covered by this Regional Permit will be processed as individual permits.

6. The permittee, upon notice of the revocation of this permit, shall, without expense to the United States and in

such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

7. The permittee hereby recognizes the possibility that any structure permitted herein may be subject to damage by wave wash from passing vessels or flooding. The permittee shall not hold the United States liable for any such damage. The issuance of this permit does not relieve the permittee from taking all proper steps to insure:

a. The integrity of the structure permitted herein.

b. The safety of boats stored or moored thereto from damage by wave wash.

8. The permittee shall not hold the city, county, state, tribal, or Federal Government responsible for the maintenance of the bottom or beach line location.

9. The permittee must have the legal right to use and occupy the affected submerged land.

10. No fill permitted herein shall be placed in such a way that it would restrict movement of vessels using existing facilities.

11. No fill permitted herein shall be placed in such a way to affect archaeological sites or other cultural resources. All anchoring systems for mooring buoys, launching rails, boat lift stations, etc., must not be buried below the lakebed surface.

12. No fill permitted herein shall be placed in the mouth of any river, stream, or creek or in a location adjacent to the mouth of a stream or creek which would alter inflow current patterns or affect natural deposition of gravel.

13. Filling in the Flathead Lake will be done in such a manner to minimize turbidity which tends to degrade water quality and damage aquatic life.

14. Fill material will consist of suitable material free from toxic pollutants in other than trace quantities.

15. Fill material will be properly maintained to prevent erosion and other nonpoint sources of pollution.

16. All construction debris will be disposed in such a manner that it cannot enter Flathead Lake.

17. Ordinary high water for the Flathead Lake hereafter means 2893.0 feet above the National Geodetic Vertical Datum.

18. Rock fill for log crib piers:

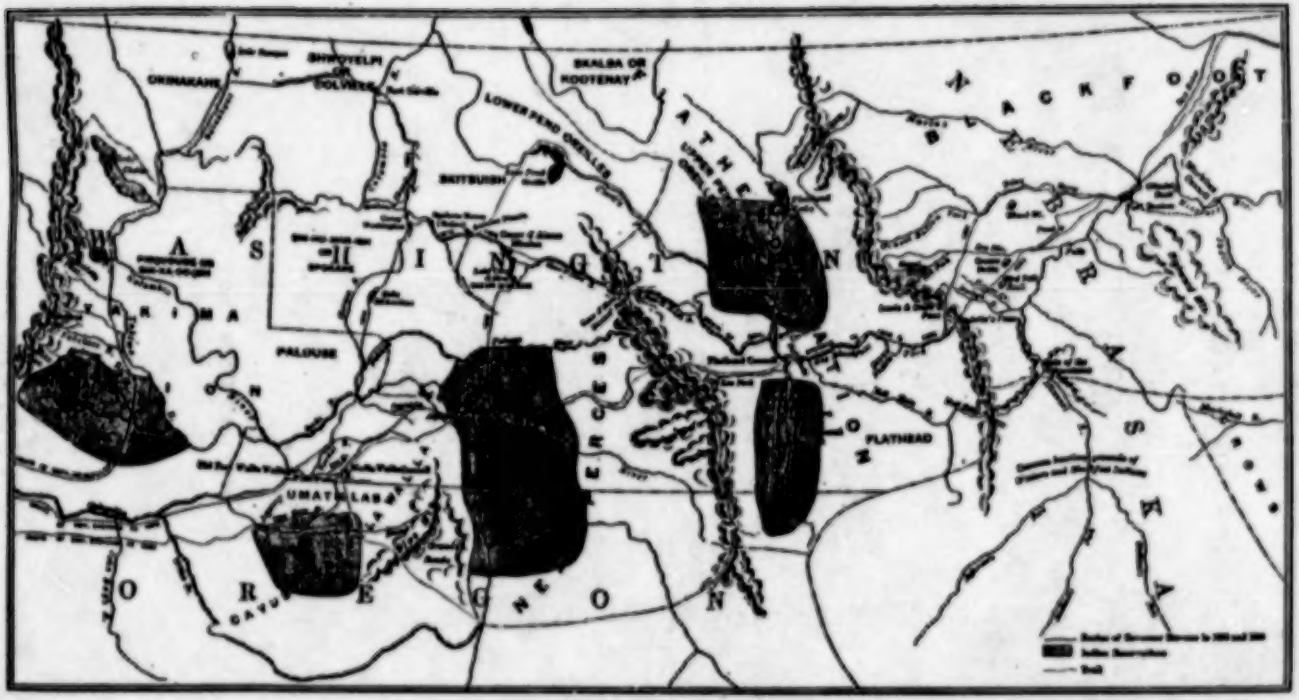
a. This permit authorizes placement of rock fill in only one pier, including an access ramp if necessary, contiguous to the shoreline per upland private property ownership. This property must be adjacent to Flathead Lake.

b. All rock fill placed in crib piers shall exceed 4 inches in diameter. Any fill that is placed in crib piers shall consist of clean rock and be free of any fine materials such as sand, silt and clay.

c. All fill that is placed in log crib piers shall be obtained from a source outside the lake, lakebed, and lakeshore protection zone. The lakeshore protection zone, as defined by local governments, includes the land area which are within 20 feet horizontally of the lake or adjacent wetlands when the lake is at ordinary high water.

d. No other structures such as living quarters, toilets or fueling facilities shall be constructed or installed on any crib pier.

e. No solid (filled) section of the crib pier (sidewall) shall exceed 20 feet in length.



THE INTERIOR FROM CASCADE MOUNTAINS TO FORT BENTON

f. A minimum of one-half (½) the total length of the sidewall of any pier greater than 20 feet in length shall remain open as free water transfer areas. The freewater area is that open area beneath a pier which is totally free of any obstructions to water transfer under the structure.

(1) All free water transfer areas shall be at least 8 feet in length as measured along the sidewall portion of the pier.

(2) One of the free water transfer areas shall be located at the ordinary high water line and extend waterward a minimum of 8 feet.

g. Rock fill for crib piers shall not be placed more than 60 feet waterward of the ordinary high water line. The crib width shall not exceed 8 feet.

h. Total crib fill area waterward of the ordinary high water line, including existing structures, shall not exceed 400 square feet for each upland private property. Maximum rock fill in the crib pier shall not exceed 150 cubic yards.

i. The solid (fill) section of the breakwater wing portion of a pier which is reasonably parallel to the shoreline, shall not exceed 25 feet in length.

j. This permit authorizes placement of rock fill in joint-use private crib piers constructed by more than one private property ownership, or by a home owner's association proprietorship.

k. Total crib fill area waterward of the ordinary high water line, including existing structures, shall not exceed 600 square feet for joint-use crib piers. Maximum rock fill in crib pier shall not exceed 250 cubic yards.

l. Rock fill for joint-use crib piers shall not be placed more than 60 feet waterward of the ordinary high water line. The crib width shall not exceed 8 feet.

m. The solid (fill) section of the breakwater wing portion of a pier which is reasonably parallel to the shoreline shall not exceed 50 feet in length for joint-use crib piers.

n. Joint-use properties shall be adjacent to Flathead Lake.

o. All affected joint-use property owners must sign a legal agreement to construct a joint-use crib pier.

19. Concrete supported piers:

a. Concrete supports may be used in lieu of rock fill material to support a pier.

b. Concrete supported piers shall not extend more than 60 feet waterward of the ordinary high water level.

c. The deck width shall not exceed 8 feet.

d. Any excavation or construction activity involving placement of wet or formed concrete shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact with lake water. Flathead Lake is normally at low pool between the months of January through April.

e. Any material that is excavated to construct the concrete pier supports and not used as backfill shall be removed entirely from the lake, lakebed and lakeshore protection zone and deposited in such a manner to prohibit its re-entry into the lake or wetland areas.

f. No solid (concrete) section of a concrete-supported pier (sidewall) shall exceed 20 feet in length.

g. A minimum of one-half (½) the total length of the sidewall of any pier greater than 20 feet in length shall remain open as free water transfer areas. The free water area is that open area beneath a pier which is totally free of any obstructions to water transfer under the structure.

h. No other structures such as living quarters, toilets or fueling facilities shall be constructed or installed on any concrete supported pier.

i. Total deck area waterward of the ordinary high water line, including existing structures, shall not exceed 656 square feet (access pier 52-feet by 8 feet and pierhead 30 feet by 8 feet) for each upland private property. The area for the concrete footing shall not exceed 200 square feet. The quantity of concrete other than the decking above the water shall not exceed 40 cubic yards.

j. A solid concrete breakwater along the wing portion of a pier which is reasonably parallel to the shoreline shall not exceed 25 feet in length.

k. This permit authorizes joint-use private piers constructed by more than one private property ownership, or by a home owner's association proprietorship.

l. Total deck area waterward of the ordinary high water line, including existing structures, shall not exceed 896 square feet (access pier 52-feet by 8 feet and pierhead 60 feet by 8 feet) for joint-use concrete piers. The areas for the concrete footings shall not exceed 300 square feet. The quantity of concrete other than the decking above the water shall not exceed 60 cubic yards.

m. A solid concrete breakwater along the wing portion of a joint-use pier which is reasonably parallel to the shoreline shall not exceed 50 feet in length for joint-use crib piers.

n. Joint-use properties shall be adjacent to Flathead Lake.

o. All affected joint-use property owners must sign a legal agreement to construct a joint-use pier.

20. Concrete boat ramps:

a. Concrete boat ramps shall not extend more than 60 feet waterward of the ordinary high water line.

b. The concrete boat ramp width shall not exceed 10 feet. The concrete ramp surface shall not exceed 6 inches in thickness. The quantity of concrete placed in the boat ramp shall not exceed 11 cubic yards.

c. The waterward end of the concrete boat ramp shall be the same elevation as the surrounding lakebed.

d. The maximum depth of fill material placed for a foundation under the concrete boat ramp shall not exceed 1 foot.

e. The quantity of fill material placed for a foundation under the concrete boat ramp shall not exceed 22 cubic yards. The foundation fill material shall be obtained from a source outside the lake, lakebed and lakeshore protection zone.

f. Fill material that is exposed along the sides of the concrete boat ramp shall be riprapped with angular rock at least 10 inches in diameter to help avoid washing under the structure. Riprap along the sides shall begin at least 4 feet landward of the ordinary high water line and extend to the most waterward portion of the ramp. If the shoreline is stabilized with an existing retaining wall, riprap along the sides shall begin at the retaining wall if less than 5 feet landward of the ordinary high water line.

g. The quantity of riprap used to cover the exposed sides of the fill shall not exceed 5 cubic yards.

h. Maximum grade of a finished boat ramp shall be 15 percent and no natural slope in excess of 45 percent grade shall be disturbed by construction of a boat ramp.

i. Any excavation or construction activity involving placement of wet or formed concrete shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact with lake water. Flathead Lake is normally at low pool between the months of January through April.

j. Any material that is excavated to construct a concrete boat ramp and not used as ramp foundation material shall be removed entirely from the lake, lakebed and lakeshore protection zone and deposited in such a manner to prohibit its re-entry into the lake.

21. Concrete support (ties) used for boat launching rails:

a. This permit authorizes the installation of one marine launching rail system per upland private property ownership. This property must be adjacent to Flathead Lake.

b. If a boat launching ramp exists on the property, this permit authorizes only marine launching rails installed on the existing ramp surface.

c. Marine launching rails shall not extend more than 100 feet waterward from the ordinary high water line.

d. Marine launching rails shall be anchored to the surface of the lakebed or to suitable railroad-type ties. Buried concrete anchors are not authorized.

e. Any excavation to obtain proper grade or construction activity involving placement of wet or formed concrete shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact with lake water. Flathead Lake is normally at low pool between the months of January through April.

f. Any material that is excavated to obtain proper grade shall be removed entirely from the lake, lakebed and lakeshore protection zone and deposited in such a manner to prohibit its re-entry into the lake.

g. The size of the concrete support shall be limited to that necessary to provide the needed foundation. In no case shall the amount of concrete used for a single concrete support (tie) for boat launching rails exceed 1 cubic yard.

22. Concrete anchors placed for mooring buoys and/or small floats:

a. Concrete anchors for mooring buoys and/or small floats shall not be placed more than 100 feet waterward of the ordinary high water line.

b. Concrete anchors shall contain no more than 1 cubic yard of concrete.

c. Only one concrete anchor for a small float or mooring buoy shall be installed per upland private property ownership. This property must be adjacent to Flathead Lake.

d. Concrete anchors shall be placed on the surface of the lakebed. Buried concrete anchors are not authorized.

e. Activities involving wet or formed cement shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact with lake water. Flathead Lake is normally at low pool between the months of January through April.

23. Concrete anchors placed for water withdrawal systems shall be limited by the following conditions:

a. This permit authorizes installation of one water withdrawal system using concrete anchors per upland private property ownership. This property must be adjacent to Flathead Lake.

b. Intake structures shall not be installed to a depth greater than 16.5 feet below ordinary high water.

c. The intake pipe shall be no greater than 4 inches in diameter (nominal).

d. Intake screens shall be provided. Maximum intake screen mesh size shall be 0.125 inches.

e. The water velocity through the intake screen shall be no greater than 0.5 feet per second.

f. The amount of concrete used in a single concrete anchor for the water withdrawal system shall not exceed 1 cubic yard.

g. Water withdrawal piping and pumps shall be anchored to the surface of the lake bed within 12 inches from the bottom or anchored to fixed structures.

h. Concrete anchors shall be placed on the surface of the lakebed. Buried concrete anchors are not authorized.

i. Activities involving wet or formed cement shall be done when the lake is at low pool and in such a manner that material and equipment will not come in contact Flathead Lake is normally at low pool between the months of January through April.

24. Concrete anchors for boat lift stations shall be limited by the following conditions:

a. This permit authorizes a maximum of two portable lift stations using concrete anchors per upland private property ownership. This property must be adjacent to Flathead Lake.

b. Boat lift stations shall not be installed more than 52 feet waterward of the ordinary high water line.

c. Boat lift stations shall be located adjacent to existing floats, piers, or walkways.

d. Boat lift stations shall not be located waterward (toward middle of lake) of existing piers, floats, or walkways.

e. The quantity of concrete used for the footings of one boat lift station shall not exceed 4 cubic yard.

f. Concrete footings for boat lift stations shall be placed on the surface of the lakebed. Buried concrete footings are not authorized.

25. To be authorized under this Regional Permit, the permittee must submit to the Seattle District Engineer

within 10 days after completion of the work within Flathead Lake, the following information:

a. Regional Permit number.

b. Name of property owner or lessee

Mailing address

Telephone

c. Description of the work.

d. Address where structure exists, including section, township, range, latitude, longitude, street address, city, county, and state.

e. Name of bay or cove, if applicable.

f. Local government.

g. Date structure was substantially completed.

h. Statement of compliance with all conditions of this Regional Permit.

i. Signature and date.

The information shall be submitted in the format identified in Appendix B.

NOTE: Sketches of typical installations are furnished for general information in Appendix A.

II. *General Conditions*:

1. That all activities identified and authorized herein shall be consistent with the terms of this permit; any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit and may result in the modification, suspension, or revocation of this permit, in whole or in part.

2. That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of fill into waters of the United States, be at all times consistent with applicable water quality standards,

effluent limitations and standards of performance, prohibitations, pretreatment standards and management practices established pursuant to the Clean Water Act (P.L. 92-500; 86 Stat. 816) or pursuant to applicable state and local law.

3. That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

4. That the fill will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

5. That the permittee agrees to make every reasonable effort to prosecute the work authorized herein in a manner so as to minimize any adverse impact of the work on fish, wildlife, and natural environmental values.

6. That the permittee agrees to prosecute the work authorized herein in a manner so as to minimize any degradation of water quality.

7. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under

authority of this permit is in accordance with the terms and conditions prescribed herein.

8. That the permittee shall maintain the structure or work authorized herein in good condition.

9. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property, invasion of rights, or any infringement of Federal, state, or local laws or regulations, nor does it obviate the requirement to obtain state or local assent required by law for the activity authorized herein.

10. That this permit does not authorize the interference with any existing or proposed Federal project, and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

11. That this permit may be either modified, suspended, or revoked, in whole or in part, if the Secretary of the Army or his authorized representative determines that activities identified and authorized within the terms or conditions of this permit are not in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after issuance of public notice of such action. Within this 30-day period, permittees may request a public hearing to be held to present oral and written evidence concerning the proposed modification, suspension, or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend, or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

12. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

13. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

14. That if and when the permittee desires to abandon the activity authorized herein, he must restore the area to a condition satisfactory to the District Engineer.

15. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

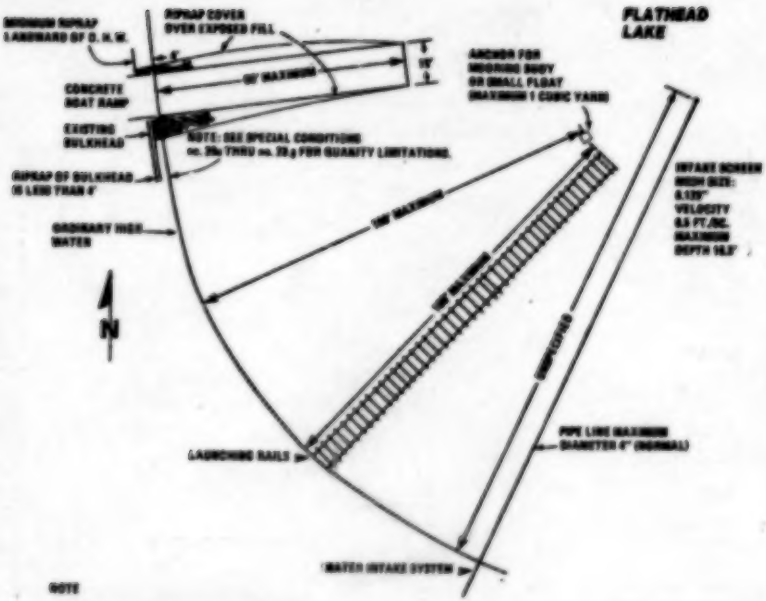
16. The word "permittee" shall include such permittee's successors in interest.

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

28 Jul 1982

/s/ Norman C. Hintz
NORMAN C. HINTZ
Colonel, Corps of Engineers
District Engineer

APPENDIX A
SKETCH OF TYPICAL INSTALLATIONS

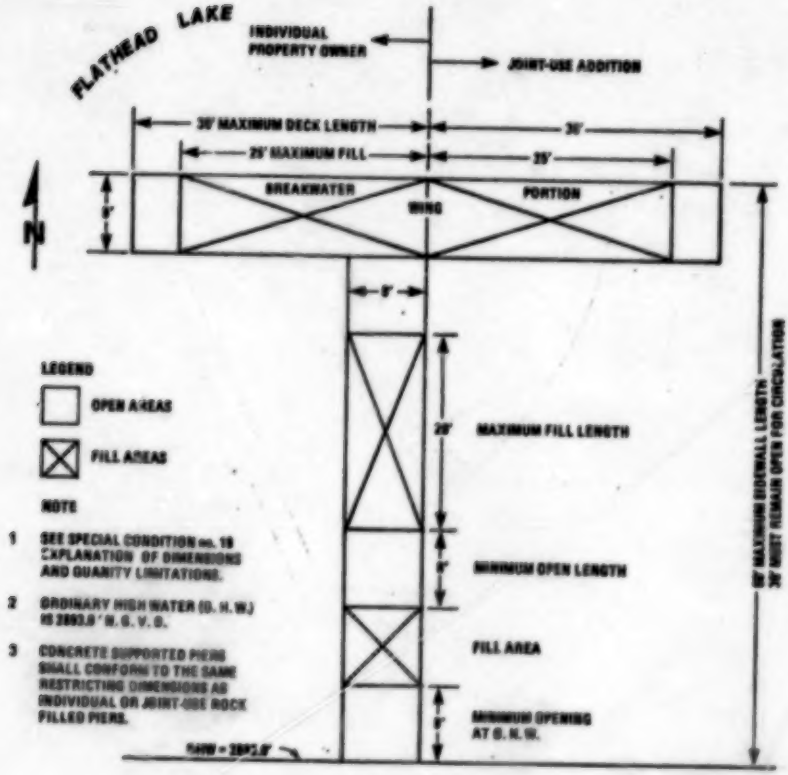

FLATHEAD LAKE
RIPRAP COVER OVER EXPOSED FILL
CONCRETE BOAT RAMP
EXISTING BULKHEAD
ANCHOR FOR MOORING BUOY OR SMALL FLOAT (MAXIMUM 1 CUBIC YARD)
ORDINARY HIGH WATER
N
LADDERWAY RAILS
PIPE LINE MAXIMUM DIAMETER 4" (NORMAL)
WATER INTAKE SYSTEM
INTAKE SCREEN MESH SIZE: 0.125" VELOCITY 0.5 FT./SEC. MAXIMUM DEPTH 16.5'

NOTE

REGIONAL PERMIT
FLATHEAD LAKE
SPT - OYB - 4 - 007000

SHEET 1 of 2

APPENDIX A
SKETCH OF TYPICAL INSTALLATIONS



REGIONAL PERMIT
FLATHEAD LAKE
071 - OYB - 4 - 007896

SHEET 2 of 2

APPENDIX B

STATEMENT OF COMPLIANCE

REGIONAL PERMIT
FLATHEAD LAKE, MONTANA
071-OYB-4-007899

1. Name of property owner or lessee:
2. Mailing address:
3. Telephone:
4. Description of work:
5. Location where structure exists:

   Latitude— Township— Range—

   Section— Longitude—

   Street address—

   City—

   County— State—
6. Name of bay or cove, if applicable:
7. Local government:
8. Date structure was substantially completed:

I certify that I have complied with all the conditions of this Regional Permit.

Signature of Permittee Date